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George B. Catmull and Florence M. Catmull v. George T. Johnson, Snowbird, LTD., and Richard D. Bass : Brief of Appellant

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GEORGE B. CATMULL and FLORENCE M. CATMULL,
Plaintiffs-Respondents,
vs.
GEORGE T. JOHNSON, SNOWBIRD, LTD., and RICHARD D. BASS,
Defendants-Appellants.

Case No. 13927

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH, THE HONORABLE STEWART M. HANSON, SR., PRESIDING.

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NATURE OF THE CASE

In this action the plaintiffs-respondents recovered a judgment against defendants-appellants on a contract for payment of royalties in connection with use of certain real property located in Little Cottonwood Canyon, Salt Lake County, Utah.

DISPOSITION IN THE LOWER COURT

The lower court granted a judgment for the plaintiffs-respondents as against defendants-appellants George T.

Johnson and Snowbird, Ltd. in the total amount of $9,698.60, and dismissed the plaintiffs-respondents' cause of action as against defendant Richard D. Bass.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendants-appellants seek a reversal of the judgment entered against them below.

STATEMENT OF FACTS

On February 28, 1966, plaintiffs-respondents (hereafter referred to as "Catmulls," George B. Catmull hereafter referred to individually as "Catmull") deeded to defendant George T. Johnson (hereafter referred to as "Johnson") all of their right, title and interest in certain mining claims patented in the name of Catmull, located in Little Cottonwood Canyon, Salt Lake County, Utah (hereafter referred to as the "Free Coinage Claims") (Ex. 8-P). This deed was subject to an agreement also dated February 28, 1966, between Johnson and Catmull, whereby Johnson agreed, in relevant part, to pay to Catmull

> a percentage of the gross receipts received by [Johnson] from any ski lift erected upon the above described lands, according to the following terms:
>
> (a) Five percent (5%) of gross receipts if such lift is erected wholly upon the subject lands;
>
> (b) If such lift is erected only partially upon the subject lands, said five percent (5%)

> of gross receipts shall be prorated in ratio of the length of such lift on the subject lands as against the total length of such lift; but in no event shall grantor receive less than two percent (2%) of said gross receipts. Ex. 5-P.

This agreement shall hereafter be referred to as "the 1966 Agreement."

Subsequent to the 1966 Agreement, Johnson deeded the Free Coinage Claims to one Alta Snowbird Ltd., a Utah limited partnership. Shortly thereafter Alta Snowbird Ltd. conveyed it to defendant-appellant Snowbird Ltd. (hereafter referred to as "Snowbird") a Utah limited partnership. When Snowbird encountered difficulties in obtaining financing in order to realize its plans for the construction of a ski resort in the environs of the Free Coinage Claims, Johnson initiated negotiations with Catmull (R. 32, 42-44, 76, 87). These negotiations culminated in a document entitled Amendment to Agreement, dated December 18, 1969, which provided in relevant part as follows:

> For valuable consideration, I [Catmull] hereby amend our Agreement of February 28, 1966 to provide that you or any successor in interest may purchase and acquire all of my rights and interests under said Agreement upon payment to me in cash as follows:
>
> If paid on or before July 1, 1970 the total price shall be $17,000.00.
>
> If paid after July 1, 1970 the total price shall be $21,000.00. Ex. 1-D.

This Amendment to Agreement is hereafter referred to as "the 1969 Amendment."

Johnson paid Catmull the sum of $10 as consideration for the 1969 Amendment, by a check dated December 18, 1969, on which it was noted "For Amendment to Agreement of February 28, 1966" (R. 35, Ex. 3-D).

In January, 1970 Snowbird obtained major financing and commenced to construct its ski facilities in Little Cottonwood Canyon. Major construction was concentrated in the summer of 1970 on the main lodge and tram facilities (R. 36). In the summer of 1971, construction was commenced on the Gad II chairlift which lift crossed the Free Coinage Claims for a linear distance of approximately 922 feet (R. 36, Ex. 13-P). By February, 1972, the Gad II lift was in operation and generating revenues (R. 36-37). The total cable length of Gad II is 4,059 feet (R. 186); the vertical rise from the bottom of the lift to the top of the lift is 1249 feet (R. 151, Ex. 22-P); Gad II's maximum capacity to carry passengers to the top is 1200 passengers per hour (R. 137, Ex. 11-P).

In the fall of 1972 Johnson attempted to initiate discusions with Catmull in connection with exercising his rights under the 1969 Amendment (R. 38). In April, 1973, Johnson offered Catmull the sum of $17,000 for purchase of Catmull's rights under the 1966 Agreement, which offer was refused by Catmull (R. 39). By a letter dated May 16, 1973, Catmull informed Johnson that he did not want to sell his royalty rights on the Free Coinage Claims (Ex. 6-P). On May 24, 1969, Johnson ten-

dered a draft in the amount of $21,000 to Catmull, for purchase of Catmull's rights under the 1966 Agreement, as per the terms of the 1969 Amendment, and Catmull refused the tender (R. 40, Ex. 4-D). Prior to May, 1973, Catmull at no time made a specific demand on Johnson or on Snowbird for payment of royalties or for payment of the $21,000 according to the terms of the 1969 Amendment (R. 201).

Thereafter this litigation was commenced, Catmulls seeking a judgment for the royalties claimed as due pursuant to the 1966 Agreement. Johnson and Snowbird refused payment of the claimed royalties on the grounds that Catmull's refusal of the May, 1973 tender was wrongful, and that they had a right, pursuant to the 1969 Amendment, to purchase Catmull's royalty rights for the sum of $21,000.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE AMENDMENT TO AGREEMENT WAS VOID FOR FAILURE OF CONSIDERATION AND LACK OF MUTUALITY.

The trial court concluded that the 1969 Amendment was void and unenforceable by Johnson because of lack of consideration and lack of mutuality. *Conclusions of Law*, paragraph 3; *Memorandum Decision*, paragraph 2. In reaching this conclusion, the trial court was clearly in error.

By the 1969 Amendment, Catmull gave Johnson an option to purchase his rights in the Free Coinage Claims for the sum of $17,000 if exercised within six months, or for the sum of $21,000 if exercised thereafter. The Amendment itself does not contain the word "option," but the rights and liabilities created by the 1969 Amendment are clearly within the scope of what is commonly referred to as an option. Professor Williston defines an option as:

> a unilateral contract whereby the optionor for a valuable consideration grants the optionee a right to make a contract of purchase but does not bind the optionee to do so; the optionor is bound during the life of the option, but the optionee is not. 1 *Williston on Contracts*, (3rd ed. 1957) § 61A. (Footnotes and citations omitted.)

Professor Williston further notes:

> The fact that the optionee is free while the optionor is bound raises the question whether mutuality plays a part in the option transaction. Written agreements known as options are not necessarily void for lack of mutuality, and, where accepted within the time specified, may become valid and enforceable contracts. Mutuality of obligation can be supplied by adding the contractual ingredient known as consideration.
>
> * * *
>
> Consideration sufficient to support the usual contract will support an option. 1 *Williston on Contracts*, (3rd ed. 1957) § 61B. (Footnotes and citations omitted.)

See also *Steel* v. *Eagle*, (1971) 207 Kan. 146, 483 P. 2d

1063; *Mack* v. *Coker*, (1974) 22 Ariz. App. 105, 523 P. 2d 1342.

In the instant matter, it is uncontroverted that Johnson paid the sum of $10 to Catmull as consideration for the 1969 Amendment. Johnson's check in that amount, dated December 18, 1969 and marked with specific reference to the 1969 Amendment, was introduced into evidence (Ex. 3-D). This is clearly sufficient consideration to support the option as a unilateral contract binding upon Catmull and enforceable according to its terms by Johnson. In *Baker* v. *Mulrooney*, (8th Cir. 1920) 265 F. 529, the court enforced an option which was supported by the sum of $10, holding that such a sum was sufficient consideration to make the offer of sale a grant of an irrevocable and exclusive option.

The trial court may have confused the necessity of contractual consideration with the concept of mutuality of obligation. It is certainly true that Johnson, by the terms of the 1969 Amendment, had no obligation to purchase Catmull's rights in the Free Coinage Claims. However mutuality of obligation is *not* always necessary for a contract to be binding and enforceable. The Supreme Court of Utah has distinguished the two concepts of mutuality of obligation and contractual consideration as follows:

> The doctrine of mutuality of obligation appears to be merely one aspect of the rule that mutual promises constitute considerations for each other.

> Where there is no other consideration for a contract, mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential. *Allen* v. *Rose Park Pharmacy*, (1951) 120 Utah 608, 612, 237 P. 2d 823, 825.

The $10 consideration given by Johnson to Catmull for the 1969 Amendment is not disputed herein. Clearly the trial court's conclusion that the Amendment was unenforceable for lack of consideration and mutuality of obligation was erroneous, and should be reversed by this court.

POINT II.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE 1969 AMENDMENT WAS UNENFORCEABLE IN MAY, 1973 DUE TO THE LAPSE OF TIME.

The trial court concluded that the 1969 Amendment, which had no specific expiration date with respect to the option to purchase for $21,000, gave Johnson the right to purchase the Free Coinage Claims for a reasonable period of time. *Memorandum Decision*, paragraph 2; *Conclusions of Law*, paragraph 3. Such a construction of the open-ended offer is in accordance with decisions in this jurisdiction and generally. See *Commercial Security Bank of Ogden* v. *Johnson*, (1946) 110 Utah 342, 173 P. 2d 277; *Colorado Woman's College* v. *Bradford-Robinson Printing*

Co., (1945) 114 Colo. 237, 157 P. 2d 612; *Boswell* v. *United States*, (5th Cir. 1941) 123 F. 2d 213. However, the trial court erroneously concluded that more than a reasonable time period had passed following the execution of the 1969 Amendment and before Johnson's tender of the $21,000, and that therefore the option had expired prior to Johnson's tender. This conclusion is not supported by the evidence.

In Utah, the test for determining what is a reasonable period of time for performance of a contractual obligation is as follows:

> *So much time as is necessary, under the circumstances, to do conveniently* what the contract or duty require should be done in a particular case.
>
> So much time as is necessary, for a *reasonably prudent and diligent man to do, conveniently*, what the contract or duty requires should be done, having a regard for the rights and possibility of loss, if any, to the other part to be affected. *Commercial Security Bank of Ogden* v. *Johnson*, (1946) 110 Utah 342, 349, 173 P. 2d 277, 281. (Citations omitted.) (Emphasis added.)

When the facts are not disputed, as in the instant matter, the determination of what is a reasonable period of time is a conclusion of law, and is therefore subject to the full review of this Court. *Alpern* v. *Mayfair Markets*, (1953) 118 Cal. App. 2d 541, 258 P. 2d 7; *Colorado Woman's College* v. *Bradford-Robinson Printing Co.*, (1945) 114 Colo. 237, 157 P. 2d 612.

The leading case in Utah to deal with the facts and circumstances relevant to the question of what is a "reasonable time" is *Commercial Security Bank of Ogden* v. *Johnson, supra.* That case involved the sale of certain real property by the defendants-sellers to the plaintiffs-purchasers. The contract of sale provided that, as part of the consideration for the sale, the purchasers would construct and put into operation an industrial alcohol distilling plant on the subject premises. Following delivery of the deed to the buyers, the buyers made preparations for the construction of the plant. However, they were unable to obtain adequate financing for the planned construction, and the plant was never built. After a period of nearly four years, the sellers rented the premises to a third party and demanded rescission of the contract. Since the parties had not specified a date for completion of the plant's construction, the issue as to whether or not the sellers could rightfully rescind depended upon whether the four year period of time was more than a "reasonable time" for the buyers to have performed their contractual obligation.

The court focused upon the factors considered by the parties themselves, at the time they contracted, in order to determine the issue of reasonable time. The buyers contended that their difficulties in obtaining financing were to be considered as one of the relevant circumstances in evaluating the reasonableness of the delay. However, the court concluded that the parties had not contracted with reference to the buyer's finan-

cial abilities. Rather, the sellers (church affiliated corporations and individuals) were interested in achieving the construction and actual operation of the plant, in order that employment opportunities would be created for the local populace. The buyers were well aware of this. The court noted:

> The Seller and Buyer did not contract in reference to the financing of the venture. It is apparent that the Seller assumed the Buyers were able financially to start and complete the plant and to put it into operation. . . . As revealed by the record the reason the Seller was interested in the construction and operation of the plant was to provide employment for the people living in that vicinity. That purpose was well known to the Buyers. That purpose could be fulfilled only by the construction of the plant and putting it into operation in a short time and not years later. . . . The financial difficulties of the Buyers . . . were not caused by the Seller. Time lost by such internal troubles of the Company and personal difficulties of the Buyers was time taken from the reasonable time allowed the Buyers and Company to fulfill their part of the contract. The financial difficulties are immaterial so far as determining what was a reasonable time for performance of the contract. 110 Utah 342, 350, 173 P. 2d 277, 281-282.

The court concluded that the four year lapse justified rescission of the contract.

Applying the court's analysis in *Commercial Security Bank of Ogden* v. *Johnson, supra,* to the instant situa-

tion, it is clear that Johnson's tender of $21,000 to Catmull in May, 1973, was well within a reasonable period of time. In the instant matter, the parties contracted with specific reference to the financing of the Snowbird ski resort facility. Catmull was made fully aware of Johnson's financing problems at the time he signed the 1969 Amendment (R. 32, 42-44, 76, 87). And Catmull was also well aware that the ultimate purpose of Johnson's acquisition of the Free Coinage Claims was to construct and operate a ski resort facility in the area. At the time of the 1969 Amendment, Catmull knew that there were no lifts or other ski facilities in operation, or even under construction (R. 80, 87). In this case, the reasonableness of the time lapse must be measured with reference to these two contemplated occurrences, *financing* of the ski facilities and the eventual revneue-generating *operation* of the facilities.

The record shows that Johnson was able to acquire financing for Snowbird shortly after the execution of the 1969 Amendment (R. 35). Construction commenced almost immediately but no facilities opened until December, 1971 and January, 1972 (R. 49). No revenue was generated by the Gad II lift, which crosses the Free Coinage claims, until February, 1972 (R. 36-37). Throughout 1972 and 1973 Johnson made efforts to raise the money necessary in order to exercise his option on the Free Coinage Claims. With the facilties finally generating revenues, Johnson tried to retain sufficient money to pay Catmull the $21,000 (R. 38). In the spring of 1973 John-

son was able to make the $21,000 tender, but even at this time he had difficulty raising the necessary amount. Johnson communicated these difficulties to Catmull (R. 39, 47). The Snowbird operating statements admitted into evidence are ample support for Johnson's testimony as to the difficulties he encountered in setting aside funds from the operation revenues. The ski facility netted a meager profit of $647.17 for the year ending May 31, 1972, and netted a loss in the amount of $698,864.08 for the year ending May 31, 1973 (Ex. 14-D). That any funds were available at all for Johnson's tender in May, 1973, is a credit to his diligent efforts as manager of the resort facilities to set aside funds for the Free Coinage Claims. The losses suffered by the resort in 1973, and the slim profit from the preceding year, indicate that the delay in the tender was the direct result of the resort's financial condition, rather than unjustified dilitoriness.

Of further significance is the evidence that Catmull was not materially prejudiced by the delay in Johnson's tender. This is *unlike* the sellers in *Commercial Security Bank of Ogden* v. *Johnson*, *supra*, whose sole purpose in contracting was frustrated by the delay in the buyers' performance. The record reveals no interest of Catmull in the performance of the 1969 Amendment other than his desire to receive valuable consideration for his remaining interest in the Free Coinage Claims. He did have a need for some immediate cash, in order to take advantage of an investment opportunity in 1969. This is why he agreed to accept the $17,000 figure for the first six months

of the option term (R. 87, 89). However, the terms of the 1969 Amendment clearly indicate that Catmull's willingness to sell was not solely predicated on receiving immediate cash, for he agreed to accept the $21,000 option figure for an indefinite time following the six month offer at $17,000.

Other jurisdictions have applied the same test as that noted above, applied by the Utah Supreme Court in *Commercial Security Bank of Ogden* v. *Johnson, supra,* for determining what is a "reasonable time" for performance of a contract. In *Colorado Woman's College* v. *Bradford-Robinson Printing Co.,* (1945) 114 Colo. 237, 157 P. 2d 612, the Colorado Supreme Court held that a time lapse of approximately six years was *reasonable* in the light of the facts and circumstances of the case. The plaintiff in that case, a church-affiliated college, had obtained from the defendant-creditor a pledge in the amount of $2,500. This sum was to be in reduction of the note then outstanding from the college to the creditor, on the express condition that the college first secure sufficient funds to pay all its other outstanding old accounts and certain second mortgage bonds. The record indicated that the college had diligently pursued fund-raising activities and finally was able to tender to the creditor its balance due on the note, minus the pledge amount. The court noted:

> The measure of reasonable time is not by a period of limitation, but by the diligence and capability of endeavor and the reasonable adap-

> tation of methods to the end to be accomplished. 157 P. 2d 612, 615.

The court noted that the creditor had not been damaged by the delay and that the college had

> diligently and continuously kept up its solicitations during the entire period in its endeavor to meet the condition . . . and clear up its debts, and there is no evidence of suspension or inefficiency or indifference or unnecessary delay, or of taking longer than was *necessary conveniently* to perform the condition. 157 P. 2d 612, 616. (Emphasis added.)

Similarly, in the instant matter, the record clearly indicates that the tender of $21,000 was made *as soon as it was conveniently possible.* During the first years of a resort operation, when so much money must be expended for capital outlay, the revenues are insufficient to meet the expenses of the young enterprise. It must be emphasized that under Utah law, as well as Colorado law, appellants were not obliged to sacrifice other legitimate business expenses and needs in order to produce the $21,000 tender. Since the parties were clearly contracting with specific reference to Snowbird's financing and operations, Snowbird's obligation was to produce the tender as soon as it was *conveniently* able to do so, following diligent and reasonable efforts to raise the money.

The record is clear that such diligent and reasonable efforts were made by Johnson and Snowbird . The tender in May, 1973, was made as soon as it was feasible, and

well within a reasonable time following execution of the 1969 Amendment. None of the facts leading to this conclusion are in dispute. Accordingly, this Court should reverse the trial court's erroneous conclusion with respect to the reasonableness of the lapse of time.

POINT III.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE 1969 AMENDMENT WAS UNENFORCEABLE IN MAY, 1973, BECAUSE CATMULL HAD AN OBLIGATION TO DEMAND PERFORMANCE BEFORE TERMINATING THE CONTRACT.

Although this issue has never been squarely raised in Utah, other jurisdictions have consistently applied the rule that when the time for performance of a contract is indefinite, a party desiring to no longer be bound by the contract must "place the other party in default," by demanding the contractual performance and allowing the other party a reasonable opportunity thereafter to perform. *Glen Cove Marina, Inc.* v. *The Vessel Little Jennie*, (E. D. N. Y. 1967) 269 F. Supp. 877; *Boswell* v. *United States*, (5th Cir. 1941) 123 F. 2d 213; *Dempsey* v. *Stauffer*, (3rd Cir. 1962) 312 F. 2d 360 (applying Pennsylvania law); *Johnston* v. *Rothenberg*, (1960) 270 Ala. 304, 118 So. 2d 744; *Leonard* v. *Rose*, (1967) 65 Cal. 2d 589, 422 P. 2d 604, 55 Cal. Rptr. 916.

In *Colorado Woman's College* v. *Bradford-Robinson*

Printing Co., supra, discussed above, the Court noted that the failure on the part of the defendant-creditor to demand payment by the college was a basis for denying the creditor avoidance of its contractual obligation. The court noted:

> Time [for performance by the college] was not essential. The company could not in good conscience be permitted knowingly to let the efforts and expenses continue and other contributions be made, all on the strength of its pledge, by silence inducing the belief it was still recognized and in force, when in fact the company had secretly determined to refuse payment . . . *In such situation the company was required to notify the college giving a definite and reasonable time for complying with the condition.* This is sometimes referred to as making time of the essence. *Until a party is put in default, he may perform a condition for which the contract fixes no time.* It is settled law that *unless time is of the essence of a contract, mere lapse of time does not avoid it or forfeit rights under it. And it is equally well settled that time is not of the essence of a contract which provides for a reasonable time.* 157 F. 2d 612, 616 (Citations omitted.) (Emphasis added.)

Another case so holding, which is especially applicable to the instant matter, is *Davis* v. *Cordell,* (1960) 237 So. C. 88, 115 S. E. 2d 649. In that case the plaintiff-seller brought an action for rescission of a contract for the sale of land to the defendant-purchaser. The trial court ordered the contract vacated on the grounds that the de-

fendant had delayed unreasonably in tendering the bulk of the purchase price due on the contract. There was no payment date specified in the contract. The appellate court reversed, on the grounds that the seller had no right to rescind the contract and avoid the obligation to sell when she had not made a specific demand upon the buyer to tender the money due. The court noted:

> Time is not of the essence of a contract which is to be performed within a reasonable time, but either party can make it so . . . by simply giving notice to that effect. *If notice is not given, the contract remains in force. It may be sued on as and existing contract and damages for its breach recovered. But it cannot be treated as at an end and a forfeiture enforced.*
>
> * * *
>
> Respondent was bound by her contract to allow appellant a reasonable time for payment of the purchase price. The just and equitable principle before mentioned required that before termination of his rights under the contract by the extreme remedy of rescission, appellant be given *express, unequivocal and reasonable notice* that unless within a specified time he should pay the purchase price in full . . . his rights would be so terminated. It appears that on several occasions . . . respondent made demand upon appellant for "some money" under the contract; but never did she notify him of any definite time after which, upon his having failed to pay, she would rescind it. 115 S. E. 2d 649, 655-6. (Emphasis added.)

The implications of this rule of law on the instant

situation are clear. At no time did Catmull demand of Johnson payment of the $21,000 purchase price, thereby placing him in default. The first indication of Catmull's unwillingness to honor his obligation was by a letter dated May 16, 1973 addressed to Johnson from Catmull, admitted into evidence as Exhibit 6-P. In that letter, Catmull stated:

> I wish to advise you I do Not Desire to sell My royalty on the property I sold you for any price.

Even if this flat denial of obligation possibly could be construed as a demand for performance within a reasonable time, Johnson responded with full performance of his obligation only eight days thereafter (Ex. 2-D), undoubtedly a reasonable time in which to raise such a sum of money.

Without a *clear, unequivocal* demand for performance Catmull had no right to abandon his obligations under the binding 1969 Amendment, and refuse Johnson's tender of the $21,000. The evidence is undisputed that no such demand was made. On this basis alone, this Court should reverse the ruling of the trial court and order specific performance of the 1969 Amendment.

POINT IV.

THE TRIAL COURT ERRED IN ADOPTING AS THE ROYALTY FORMULA THAT METHOD USED BY THE UNITED STATES

FOREST SERVICE IN ITS SPECIAL USE PERMIT.

There was lengthy testimony before the trial court concerning the proper method to be used in calculating the royalties provided for in the 1966 Agreement. The 1966 Agreement provided that Catmull was to receive a minimum of two percent of the gross receipts attributable to the Gad II lift. The problem before the trial court was to fairly calculate what portion of the total lift operating receipts was fairly attributable to the Gad II lift, since no special pass is sold for skiing only on the Gad II lift. Assuming of course that enforcement of the 1966 Agreement is proper, Catmull is entitled to two percent of whatever figure is determined to represent the Gad II lift gross receipts.

The trial court concluded that the proper method to use in calculating the revenue attributable to the Gad II was the methodology used by the Forest Service in its Term Special Use Permit for Snowbird. *Memorandum Decision*, paragraph 3, *Findings of Fact*, paragraph 16. However, this conclusion is not supported by the evidence, and in fact is in contravention of uncontradicted testimony and evidence before the court concerning the use which is in fact made of the Gad II lift.

The record clearly indicates that the calculation of revenues attributable to particular ski lift is a more complex matter than simply counting heads and ascertaining the total number of passenger rides any one lift performs

compared to other lifts. The complexity is caused by the fact that short lifts, which go into relatively easy skiing terrain, will transport a skier several more times in one day than will a longer lift which ventures into steeper and more difficult terrain. To equate a short "easy" ride with a long and "difficult" ride is unrealistic, especially when ski passes are purchased for a period of time (an all-day pass or a half-day pass, for example) rather than by a unit price per ride (R. 166, 197). Hence, the easiest method, of simply counting passenger rides for all facilities and passenger rides for the Gad II lift, and then taking the percentage of total tram-lift revenue equivalent to the percentage of Gad II passenger rides to total passenger rides, is not reflective of the true revenue generating power of Gad II.

The United States Forest Service (hereafter "Forest Service") acknowledges as much in its manner of calculating its permit fees. The Forest Service has granted a Term Special Use Permit to Snowbird authorizing winter sport use of certain forest land in the environs of the Snowbird resort (Ex. 12). The fee for such use is two percent of the net sales and other income from the facilities located on forest land. Hence the Forest Service has a problem at least facially comparable to that created by the 1966 Agreement, i.e. attributing revenue to particular ski facilities and lifts.

The Forest Service calculates its permit fees by multiplying the total passenger capacity of all Snowbird's

lifts by the total slope distances of all Snowbird's lifts. The percentage of this figure which crosses forest land is then calculated. The resulting figure is multiplied by .02 in order to arrive at the Forest Service's two percent permit fee. The calculation basically evaluates the passenger capacity and the slope distance as the relevant factors by which to evaluate revenue-generating power of a lift facility (R. 161). This is the formula ordered by the trial court to be used in connection with the 1966 Agreement at issue herein.

However the trial court had better, and more probative evidence at hand by which to calculate the Gad II revenues. Snowbird called as a witness its manager of up-hill facilities, David Weatherbee (hereafter "Weatherbee") who gave extensive testimony as to his own on-site daily observations of the use made of the Gad II lift at Snowbird. He testified that Gad II in fact only contributes approximately five to six percent of the total tram-lift revenue at Snowbird, as opposed to the approximate 21% figure resulting from use of the Forest Service formula (R. 161). He fully explained the basis for this conclusion, with testimony which was neither impeached nor contradicted in the record. Weatherbee noted several factors tending to reduce the actual use of Gad II: (1) it is remote from the parking and main lodge facilities, commencing very close to the top of the Gad I lift, so that a passenger on Gad II must first take the tram or the Gad I lift in order to get to the Gad II lift (R. 131); it takes the skier into difficult and steep

terrain, with deep moguls which tend to make skiing the area even more difficult (R. 131); the difficulty and remoteness both tend to discourage the average day-pass skier and encourage use by season ticket holders (who pay less for their skiing) and Snowbird employees (who do not pay at all for their skiing) (R. 132); it is the last lift to be opened on snow-hazard days because of the avalanche danger in that particular vicinity (R. 132); avalanche danger keeps the Gad II lift closed all day long more frequently than other Snowbird lifts (R. 132); the Gad II lift is closed earlier in the day than other lifts, as it sits nearer the top of the mountain and is the first area to be "swept" by the safety ski patrol (R. 132); and it is down for longer periods of time because of mechanical failure than the other lifts, because of its relative remoteness from the main Snowbird facilities (R. 133).

According to this uncontradicted testimony of Weatherbee, the only witness before the court to testify concerning revenues who had any personal knowledge as to the Gad II lift and the other Snowbird up-hill facilities, the royalties due Catmull under the 1966 Agreement for 1971-72 were $520, for 1972-73, $517, and for 1973-74, $1,789, or a total sum of $3,826. The personal observations of this knowledgeable expert are of far greater probative value than the abstract formula and equation used by the court. On the basis of Weatherbee's clear and uncontradicted testimony, this Court should reverse the trial court's conclusions as to use of the Forest Service form-

ula and remand for entry judgment consistent with Weatherbee's testimony and personal observations.

Even if this Court concludes that use of a formula is a better or more reliable basis for calculation of the royalties than the testimony as to Weatherbee's observations, use of the Forest Service formula is clearly erroneous. The evidence before the trial court established that the Forest Service calculation fails to adequately evaluate skier use of any particular lift in that it has no basis for evaluating the difficulties of the skiing terrain serviced by the lift (R. 161, 166, 189-90). The Forest Service calculation considers only passenger capacity and slope distance as the relevant factors. It would have to consider also the factor of vertical rise in order to effectively assess the difficulty of the skiing terrain (R. 189-90).

The evidence before the court indicated that ski resort areas and lift manufacturers around the country consider vertical rise as a necessary and relevant component in evaluating ski lift performance in their advertising and marketing (R. 171). The importance of this vertical rise factor, when considered together with passenger capacity and slope distance, was explained at length by Weatherbee:

> We are interested here in attempting to determine what gross revenues can be assigned to the Gad II chair lift. None of these factors individually have anything to do with revenue. Taken

all three together they come with a percentage which by on-site observation is more accurate than any other figure . . .

The capacity per hour is an assigned reading. It is built in when a lift is manufactured. The cable slope distance is also a measured distance, and that involves the timing factors with the length of the lift, the entire length of the lift. And the vertical rise has to do with the difficulty of the terrain that lies underneath the lift.

* * *

[Y]ou have to have all three if you are going to make any determination of revenue that can be assigned to that lift because all three are tied very, very closely together.

The Forest Service isn't interested in any single lift producing revenue. They are interested in the whole shooting match at once. They want to know everything about the whole area.

In this particular case we are only interested in assigning gross revenue to the Gad II chair lift. Short of selling a Gad II ticket, which we do not do, the only thing we can do is to come up with a satisfactory basis of the facility which most closely reaches what the on-site observations have been, and that its what I have tried to do in this particular case (R. 189-190).

Weatherbee's calculations as to the use of this proposed formula, passenger capacity x cable slope distance x vertical rise, were introduced into evidence as Exhibit 20-D. Those calculations indicated that the percent of

revenue attributable to Gad II was 15.9%, rather than the Forest Service formula calculation of approximately 21%. The reduction is caused by the realistic appraisal of the high vertical rise of the Gad II lift, and the relative difficulty of the terrain crossed by the lift. The difficulty of the terrain means that a more select, and smaller group of skiers use the lift, and that it takes those skiers a longer time to reach the bottom of the lift and re-board the lift. According to Weatherbee's uncontradicted testimony, these factors are observable with respect to the Gad II lift, and their impact should be reflected in the calculation of revenue attributable to the Gad II life.

In light of the evidence before the court, it was reversible error of the trial court to adopt the less accurate Forest Service formula for attributing revenue to the Gad II lift. The evidence does not support the trial court's use of that formula. This Court should reverse the trial court's conclusion, and if any judgment be entered whatsoever under the 1966 Agreement using a formula for the revenue calculation, it should be based upon the formula of passenger capacity x cable length x vertical rise in order that the revenue determination reflects the three relevant factors of passenger load, lift length, and the difficulty of the skiing terrain.

CONCLUSION

Based upon the foregoing arguments and authorities, which indicate an accumulation of errors made by the

trial court, including the erroneous determination of the royalty formula, it is respectfully submitted that the judgment of the trial court should be reversed.

Respectfully submitted,

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